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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1111

TALMAN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,

Petitioner,

vs.

MARY M. CARROLL, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION.

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TABLE OF CONTENTS.

PAGE

Table of Authorities ii

Question for Review..... 2

Statement of the Case..... 3

I. Talman's Requirement That Women Wear Uniforms 3

II. Refusal to Wear the Uniform..... 6

III. Procedural Posture of this Case..... 7

Summary of Reasons for Denying the Writ..... 9

Reasons for Denying the Writ..... 10

I. Introduction 10

II. The Seventh Circuit Was Right on the Merits.. 10

A. Carroll Has Established a *Prima Facie* Case of Sex Discrimination Under Title VII.... 10

B. A "Term or Condition of Employment" Under Section 703(a)(1) Need Not Affect Employment Opportunities..... 12

C. No Business Necessity or Bona Fide Occupational Qualification Justifies Talman's Uniform Policy..... 15

III. No Conflict Exists Among the Circuits..... 17

IV. Analogies to the Other Forms of Discrimination Covered by Title VII Show That Talman's Dress Code Discriminates on the Basis of Sex..... 19

Conclusion 20

Table of Authorities.

Cases.

Allen v. Lovejoy, 553 F. 2d 522 (6th Cir. 1977) 13

Barnes v. Costle, 561 F. 2d 983 (D. C. Cir. 1977) 19

Burns v. Rohr Corporation, 346 F. Supp. 994 (S. D. Cal. 1972) 13

Califano v. Goldfarb, 430 U. S. 199 (1977) 12

Carroll v. Talman Federal Savings and Loan, 448 F. Supp. 79 (N. D. Ill. 1978), *rev'd* 604 F. 2d 1028 (1979) ... 7, 8

Carroll v. Talman Federal Savings and Loan, 604 F. 2d 1028 (7th Cir. 1979), *rev'g* 448 F. Supp. 79 (N. D. Ill. 1978) 6, 8, 11, 17, 18

Chastang v. Flynn & Emrich Co., 541 F. 2d 1040 (4th Cir. 1976) 16

Craig v. Boren, 429 U. S. 190 (1976) 12

Dothard v. Rawlinson, 433 U. S. 321 (1977) 12, 16, 19

EEOC v. New York Times Broadcasting Service, Inc., 542 F. 2d 356 (6th Cir. 1976) 17

Flesch v. Eastern Pennsylvania Psychiatric Institute, 434 F. Supp. 963 (E. D. Pa. 1977) 13

Frontiero v. Richardson, 411 U. S. 677 (1973) 12

Furnco Construction Corp. v. Waters, 438 U. S. 567 (1978) 15

Harrington v. Vandalia-Butler Bd. of Education, 418 F. Supp. 603 (S. D. Ohio 1976), *rev'd* as to damages and attorneys' fees, 585 F. 2d 192 (1978), *cert. denied* 441 U. S. 932 (1979) 13, 14, 18

International Brotherhood of Teamsters v. United States, 431 U. S. 324 (1977) 11

Laffey v. Northwest Airlines, Inc., 366 F. Supp. 763 (D. D. C. 1973), *modified* 567 F. 2d 429 (1976), *cert. denied* 434 U. S. 1086 (1978) 14, 18

Los Angeles Dep't of Water & Power v. Manhart, 435 U. S. 702 (1978) 9, 11, 12, 15, 17, 18, 19

McDonnell Douglas Corp. v. Green, 411 U. S. 792 (1973) 11, 16

Palmer v. Central Mills, Inc., 513 F. 2d 1040 (6th Cir. 1975) 19

Reed v. Reed, 404 U. S. 71 (1971) 12

Roberts v. General Mills, Inc., 337 F. Supp. 1055 (N. D. Ohio 1971) 13

Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir.), *cert. dismissed* 404 U. S. 1006 (1971) 16

Sprogis v. United Airlines, Inc., 444 F. 2d 1194 (7th Cir.), *cert. denied* 404 U. S. 991 (1971) 15

Stanton v. Stanton, 421 U. S. 7 (1975) 12

Tomkins v. Public Service Elec. & Gas Co., 568 F. 2d 1044 (3d Cir. 1977) 12

United States v. Bethlehem Steel Corp., 446 F. 2d 652 (2d Cir. 1971) 16

Yuhas v. Libby-Owens-Ford Co., 562 F. 2d 496 (7th Cir. 1977), *cert. denied* 435 U. S. 934 (1978) 19

Waters v. Wisconsin Steel Works, International Harvester Co., 502 F. 2d 1309 (7th Cir. 1974), *cert. denied* 425 U. S. 997 (1976) 16, 17

Weinberger v. Wisenfeld, 420 U. S. 636 (1975) 12

Administrative Decisions.

Concord Docu-Prep, Inc., 207 NLRB 981 (1973) 14

EEOC Dec. No. 70-503, CCH EEOC Rep. ¶ 6113 (1970) 14

EEOC Dec. No. 71-109, CCH EEOC Rep. ¶ 6165 (1970) 14

EEOC Dec. No. 77-36, CCH EEOC Rep. ¶ 6588 (1977) 14

Nyari Odette, Inc., 229 NLRB 137 (1977) 14

Statutes.

Civil Rights Act of 1964, Title VII:

§ 703(a)(1); 42 U. S. C. § 2000e-2(a)(1) .....
.....2, 9, 10, 11, 12, 13, 15, 18, 19

§ 703(a)(2); 42 U. S. C. § 2000e-2(a)(2) 13

§ 703(e); 42 U. S. C. § 2000e-2(e) 16

National Labor Relations Act; 29 U. S. C. § 151 *et seq*... 14

Legislative History.

H. R. 7152, 110 Cong. Rec. 7213 (1964) 13

H. R. 92-238, 1972 U. S. Code, Cong. & Ad. News 2140-2141 19

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION.

The Respondent, Mary M. Carroll, on behalf of herself and all others similarly situated, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's decision in this case.

QUESTION FOR REVIEW.

Does a gender-based dress code that permits men employees to wear any clothing that constitutes appropriate business attire, but requires women employees to wear a specified uniform, constitute sex discrimination with respect to terms or conditions of employment under Section 703(a)(1) of Title VII of the Civil Rights Act of 1964?

STATEMENT OF THE CASE.

I.

TALMAN'S REQUIREMENT THAT WOMEN WEAR UNIFORMS.

Talman Federal Savings and Loan Association of Chicago ("Talman") is a savings and loan association with its main office in Chicago, Illinois. Talman employs approximately 800 people, 675 of whom are office and managerial employees and tellers. P. App. 29-30.[1]

By a written rule, which it enforces, Talman requires all of its women tellers, women office workers, and women managers to wear a specific type, color, and style of uniform made by a certain manufacturer. No such requirement is placed upon the men tellers, managers and office personnel of Talman. P. App. 113-115. Under this dress code, codified in the Talman Personnel Policies Manual, all women employees—from tellers to the sole female senior vice president—must wear a prescribed two-piece uniform while at work. P. App. 113-115.

Although in this litigation Talman has euphemistically referred to the uniform as a "career ensemble," in Talman's own internal memoranda, the "career ensemble" is frequently called a uniform. *See, e.g.*, P. App. 106-112. Twice a year, Talman chooses a new uniform for all women employees, and the individual uniforms are then ordered from the same manufacturer. P. App. 31-32. The women employees must wear this uniform while at work. They are not permitted to wear other clothing, even clothing that closely resembles the designated uniform. P. App. 113-115. For example, if the current uniform is orange (such as the uniform shown in the photograph, Petition for

1. "P. App." refers to Plaintiff's Appendix filed in the Seventh Circuit.

Certiorari at A4), only that particular orange uniform may be worn. No women employees of Talman may substitute a neutral business dress or suit for the uniform. Talman also specifies what women shall wear with the uniform, restricting the color and type of blouse and the type of hosiery which may be worn. P. App. 36-37, 86-88. The result is that all Talman's women employees wear identical uniforms of the same color, material, cut, and manufacture.

None of Talman's men employees wear uniforms except low-level employees such as couriers, janitors and maintenance staff.[2] All other men employed by Talman, including office and managerial staff and tellers, have a simple, practical dress code, which permits men to wear "appropriate business attire." P. App. 60. Talman defines this as follows:

> Men may wear either the customary business suits or a combination of business-type sport jacket and pants. Ties shall be worn by men. P. App. 113.

Talman has no other written definition of what constitutes appropriate business attire for males. P. App. 60. Talman has no rule regulating the color, type, style or pattern of apparel that can be worn by its men employees. P. App. 60. Indeed, Talman permits men employees to wear "leisure suits" with shirts and ties. P. App. 59-72.

From about 1958 to 1969, Talman did require its male tellers to wear a certain type of business suit at work; this restriction was eliminated at the request of a few of the part-time male tellers, who found it inconvenient. P. App. 57, 59. Talman then decided that "appropriate business attire" sufficiently regulated

2. Talman has 19 male couriers and supply room personnel who are required to wear a different type of uniform. P. App. 54-55. In addition, Talman's guards, parking lot attendants, and supply room, housekeeping, and maintenance employees, are required to wear a designated uniform while on duty. However, in each case in which both men and women are employed in these positions, both men and women are required to wear the designated uniform. P. App. 54-56.

the dress of all its men tellers, office workers, and managerial staff. P. App. 59-60.

Talman's women employees must wear the uniform every day except the last Tuesday of each month and the week between December 25 and January 1, ironically called "glamour days." P. App. 40-41, 73-74. Talman's women employees wear "appropriate business attire" on "glamour days." P. App. 40-41, 73-74. Although Talman has, without support in the record, suggested otherwise in its Petition for Certiorari, Talman admits that many different types of clothing worn by its women employees on "glamour days" constitute appropriate business attire and that the vast majority of its women employees have consistently worn appropriate business attire on "glamour days." P. App. 77, 82, 89.

The determination whether a woman's clothing on a "glamour day" constitutes "appropriate business attire" is made by each Talman branch manager, subject to the advice and direction of Erhardt Hilgendorf, Talman's Manager of Personnel. P. App. 77-80. Only rarely has a branch manager informed a woman employee that her clothing was unacceptable. There is no evidence that a woman employee of Talman has ever worn clothing which required further action; indeed, the evidence indicates the vast majority of Talman's women employees have worn appropriate business attire to work on "glamour days." P. App. 77-83, 89.

The procedure used to regulate the clothing of women employees on "glamour days" is used to monitor the dress of Talman's men employees every day. The appropriateness of the clothing worn by Talman's men employees is determined on an *ad hoc* basis by the branch manager, subject to the advice and direction of Hilgendorf. P. App. 60-65, 77.

The stated purpose of the "women *must* wear uniforms/men *may* wear appropriate business attire" dichotomy promulgated by Talman is to insure that Talman employees present a busi-

ness-like appearance to its customers. P. App. 83-85. However, as noted by the Seventh Circuit, Talman has both directly and indirectly articulated another reason why it forces women to wear a uniform. Petition for Certiorari at A10-A11. Before the Seventh Circuit, Talman's counsel, without any support in the record, stated:

> the selection of attire, of clothing on the part of women is not a matter of business judgment. It is a matter of taste, a matter of what the other women are wearing, what fashion is currently. When we get into that realm * * * problems develop. Somehow, the women who have excellent business judgment somehow follow the fashion, and the slit-skirt fashion which is currently prevalent * * *. They tend to follow those [fashions] and they don't seem to equate that with a matter of business judgment. Petition for Certiorari at A11.

Talman believes that requiring women to wear the uniform is necessary "to avoid competition in dress among female employees." P. App. 30-31. Without any support in the record, Talman also believes that without a dress code, the problems of defining appropriate business attire for women would be "endless." (*See* Brief of Defendant-Appellee Talman, filed in the Seventh Circuit, at 47-48). Thus, Talman argues that the only way to insure that women wear appropriate business attire is to put them in uniform. (*Id.* at 49).

II.

CARROLL'S REFUSAL TO WEAR THE UNIFORM.

Mary Carroll ("Carroll") was hired as a part-time employee by Talman in 1973, when she was a university student. By 1976, Carroll had become a savings counsellor trainee. Talman considered Carroll an above-average employee, and raised her pay many times. A. 31-52.[3] Before May 11, 1976, Carroll wore the

3. "A." refers to Plaintiff's Appendix to Memorandum in Support of Her Motion for Summary Judgment filed in the District Court.

uniform while at work. Petition for Certiorari at A25. On four days in that month, Carroll did not wear the uniform. *Id.* The District Court specifically found that the clothing she wore on these days was appropriate business attire. *Id.* A branch manager of Talman warned Carroll on each of the first three days that she must wear the uniform at work. On the fourth day, Carroll refused to wear the uniform; a Talman branch manager ordered her to see Mr. Hilgendorf, who administered the rule requiring women to wear the uniform. Carroll met with Hilgendorf and Thomas Prost, a senior vice president of Talman, and told them that she did not intend to wear the uniform at work if men were not required to do so as well. Hilgendorf told Carroll that she would be suspended if she refused to wear the uniform, whether or not her clothing was appropriate and regardless of what Talman's male employees wore. Carroll reiterated her refusal to wear the uniform under these circumstances and the meeting ended. P. App. 49-52. On May 22, 1976, Talman notified Carroll by written memorandum that she was suspended indefinitely without pay until she reported for work in uniform. P. App. 117.[4]

III.

PROCEDURAL POSTURE OF THIS CASE.

Before suing Talman in District Court, Carroll exhausted her administrative and state remedies. On October 2, 1973, Carroll had filed a Charge of Discrimination with the Equal Employment Opportunity Commission alleging that Talman's uniform policy discriminated against her on the basis of sex. A. 1. The EEOC conducted a thorough investigation and attempted a conciliation between the parties. A. 6-8. However, the

4. Without citing any authority, Talman asserts that since suspension of its requirement that women wear the uniform, Talman has had problems with its women wearing "unbusinesslike clothing." Petition for Certiorari at 12. This bald statement has no support in the record and contradicts Talman's own admission that its women dress properly on "glamour days."

Counter-Proposal submitted to the EEOC by Talman merely reiterated the latter's existing policy by suggesting that women be required to wear the uniform and men could wear "career ensembles" consisting of any "business suit or business-like sport jacket, pants, and tie." A. 19-25. The EEOC then issued a Determination in which it found that there was reasonable cause to believe that Talman's uniform policy violated Title VII. P. App. 18-19. After its conciliation efforts failed, the EEOC issued a "Right to Sue" letter to Carroll on February 13, 1976. P. App. 20. Carroll filed this suit in a timely fashion on May 7, 1976.

Talman has admitted, and the District Court specifically found, that the sole reason for Carroll's suspension was her failure to wear the uniform while at work. P. App. 47-48, Petition for Certiorari at A25. Talman has not contended that any of the clothing worn by Carroll on the four days in May was inappropriate. Talman's position was and is that a woman employee may be suspended for failing to wear the uniform, even if her clothing is appropriate business attire. P. App. 52. Talman has refused to recognize any alternatives to the mandatory uniform policy, although, as the Seventh Circuit recognized, such alternatives (*e.g.*, making the uniforms optional) exist. Petition for Certiorari at A8. In addition, Talman has accused Carroll of being "disruptive" and of breaching her duty of loyalty to Talman by her "attacks." Brief of Defendant-Appellee Talman, filed in the Seventh Circuit, at 61-62. Because of Talman's intransigence, Carroll was compelled to file suit.

SUMMARY OF REASONS FOR DENYING THE WRIT.

The central question is: does an employer violate Title VII by requiring all its women employees to wear a prescribed uniform while permitting its men employees to wear any "appropriate business attire"? Under the plain language of Section 703(a)(1) of Title VII and this Court's decision in *Los Angeles Dep't of Water & Power* v. *Manhart*, such a dress code clearly establishes a *prima facie* case of sex discrimination. The two sexes are treated differently, and the only basis for the differential treatment is the employee's sex. Talman proved no affirmative defense to this *prima facie* case. Talman has shown neither a business necessity nor a *bona fide* occupational qualification ("bfoq"), the two affirmative defenses to discrimination recognized by the courts.

Talman argues that the decision of the Seventh Circuit conflicts with the decisions of seven other circuits. This argument is utterly misleading. The decisions in question hold that not every form of differential treatment of the sexes is discrimination. The Seventh Circuit agreed with that principle, simply holding that the facts of this case showed discrimination. Further, the other cases were all decided before *Manhart*, and the more recent decisions of the "conflicting" courts of appeal show that they agree with the result reached by the Seventh Circuit in this case.

Finally, analogies to other forms of discrimination, such as race, highlight the existence of discrimination in the instant case. Surely, a policy requiring all black employees to wear uniforms and permitting all white employees to wear appropriate business attire would constitute an egregious form of racial discrimination.

REASONS FOR DENYING THE WRIT.

I.

INTRODUCTION.

The central question in this case is: does an employer violate Title VII by requiring all women employees to wear a prescribed uniform while permitting men employees to wear any appropriate business attire? The Seventh Circuit properly addressed this question by considering first, whether Talman's dual dress code established a *prima facie* case of discrimination in violation of Title VII, and, second, whether any business necessity requires such discrimination. The Seventh Circuit refuted Talman's suggestions that the "long hair" cases control the case and that public policy sanctions a requirement that women wear uniforms.

II.

THE SEVENTH CIRCUIT WAS RIGHT ON THE MERITS.

A. Carroll Has Established a Prima Facie Case of Sex Discrimination Under Title VII.

Talman's written, enforced policy requiring all women tellers, women office workers, and women managers to wear the uniform, without any similar requirement for Talman's comparable men employees, constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964.

Section 703(a)(1) of Title VII, 42 U. S. C. § 2000e-2(a)(1), provides that it shall be an unlawful employment practice for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

To prove a Title VII violation, Carroll need only establish that the challenged regulation does in fact discriminate against women. If she does, the burden then shifts to the employer to prove that some business necessity or a *bona fide* occupational qualification justifies the discriminatory regulation. *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792 (1973); *International Brotherhood of Teamsters* v. *United States,* 431 U. S. 324 (1977).

As the Seventh Circuit stated, the requirement to wear the uniform is obviously a term and condition imposed by Talman on all women employees. Petition for Certiorari at A2-A3. No such term or condition exists for similarly situated men employees. This disparate treatment of Talman's employees with respect to a term and condition of employment constitutes an illegitimate classification of employees based solely on sex, and Carroll has therefore established a *prima facie* case of sex discrimination.

This result is compelled by the recent, definitive decision of this Court in *Los Angeles Dep't of Water & Power* v. *Manhart,* 435 U. S. 702 (1978), which Talman virtually ignores in its Petition. In *Manhart,* the employer's pension plan required women employees to contribute approximately 15% more to the fund than similarly situated men in order to receive equal benefits. The differential was based on actuarial tables indicating that women, as a class, live longer than men and that the cost of their pensions therefore is higher. Nevertheless, the Supreme Court held that the pension program violated Section 703(a)(1), stating that this section focuses on individual characteristics rather than the characteristics of a class to which the individual belongs. Since the employer's policy treated men and women differently, and since the only basis for the disparate

treatment was the individual's sex, the Court held that the practice constituted discrimination because it

> does not pass the simple test of whether the evidence shows "treatment of a person in a manner which but for that person's sex would be different." 435 U. S. at 711.

In the case at bar, as in *Manhart*, the rule in question differentiates between women, all of whom are required to wear the uniform, and men, none of whom wear a uniform. There is complete identity between sex and the uniform policy: neither group contains any member of the opposite gender and each group contains all members of one gender. Thus, Carroll has established a *prima facie* case of sex discrimination under Title VII.

This Court has reached the same result in other situations in which similarly situated men and women were treated differently. *See, e.g., Reed* v. *Reed,* 404 U. S. 71 (1972), *Frontiero* v. *Richardson,* 411 U. S. 677 (1973), *Stanton* v. *Stanton,* 421 U. S. 7 (1975), *Craig* v. *Boren,* 429 U. S. 190 (1976), *Weinberger* v. *Wisenfeld,* 420 U. S. 636 (1975), *Califano* v. *Goldfarb,* 430 U. S. 199 (1977), and *Dothard* v. *Rawlinson,* 433 U. S. 321 (1977). The lower courts, of course, have followed these cases. *See, e.g., Tomkins* v. *Public Elec. & Gas Co.,* 568 F. 2d 1044, 1047 n. 4 (3d Cir. 1977).

In summary, when any regulation differentiates between men and women solely on the basis of sex, as does Talman's dual dress code, a *prima facie* case of sex discrimination exists.

B. A "Term or Condition of Employment" Under § 703 (a)(1) Need Not Affect Employment Opportunities.

Talman has argued repeatedly that a gender-based dress code does not constitute sex discrimination because it does not affect the hiring, firing or promoting, *i.e.,* the "employment opportunities", of women. In making this argument, Talman ignores the obvious impact of its own policy: women like Mary Carroll, who refuse to wear the uniform, are suspended without pay. P. App. 48, Petition for Certiorari at A25. Surely there could be no more direct effect on employment opportunities.

Further, the phrase "employment opportunities" appears only in § 703(a)(2)—not in § 703(a)(1), the section under which Carroll sued. Congress clearly intended § 703(a)(1) to cover discrimination that does not affect employment opportunities. *See,* H. R. 7152, 110 Cong. Rec. 7213 (1964) (memorandum submitted by floor managers of Title VII defines "to discriminate" as "to make a distinction, to make a difference in treatment or favor . . .").

The cases have followed this interpretation, repeatedly finding that discrimination exists under facts unrelated to employment opportunities. For example:

1. An employer's rule required newly married women employees to sign forms authorizing the change of their name on personnel forms to that of their husband, with no similar requirement for men. *Allen* v. *Lovejoy,* 553 F. 2d 522 (6th Cir. 1977);
2. Plaintiff's claim that she had been deprived of adequate supporting staff, facilities, and equipment because of her sex stated a cause of action under Title VII. *Flesch* v. *Eastern Pennsylvania Psychiatric Institute,* 434 F. Supp. 963 (E. D. Pa. 1977);
3. Women employees were given two ten-minute breaks per day which were not given to men employees. *Burns* v. *Rohr Corporation,* 346 F. Supp. 994 (S. D. Cal. 1972);
4. Women working near food were required to wear hairnets, while men, although required to wear hats, were prohibited from wearing hairnets. *Roberts* v. *General Mills, Inc.,* 337 F. Supp. 1055 (N. D. Ohio 1971);
5. Women gym teachers were assigned small, open offices while men gym teachers received large, private offices. *Harrington* v. *Vandalia-Butler Bd. of Education,* 418

F. Supp. 603 (S. D. Ohio 1976), *rev'd as to damages and attorneys' fees* 585 F. 2d 192 (1978), *cert. denied* 441 U. S. 932 (1979);

6. Women were not allowed to wear eye glasses, but men were, and women's luggage was strictly regulated as to brand, size, and color, but men's was not. *Laffey* v. *Northwest Airlines, Inc.*, 366 F. Supp. 763 (D. D. C. 1973), *modified* 567 F. 2d 429 (1976), *cert. denied* 434 U. S. 1086 (1978);
7. Women were not allowed to smoke on the job, but men were. EEOC Dec. No. 71-109, CCH EEOC Rep. ¶ 6165 (1970); EEOC Dec. No. 70-503, CCH EEOC Rep. ¶ 6113 (1970);
8. Women were required to wear sexually provocative costumes, but men performing similar jobs were not. EEOC Dec. No. 77-36, CCH EEOC Rep. ¶ 6588 (1977).

Such an interpretation of "terms and conditions of employment" is not at all unusual. For example, under the National Labor Relations Act, the NLRB has held that "terms and conditions of employment" include dress codes. *Nyari Odette, Inc.*, 229 NLRB 137 (1977), *Concord Docu-Prep, Inc.*, 207 NLRB 981 (1973).

The logic of Talman's argument is that any terms or conditions of employment that do not affect job opportunities can never support a discrimination claim. In *Harrington*, the Sixth Circuit roundly rejected this argument:

> We reject the Board's claim that Section 703(a)(1) of Title VII and its reference to "terms, conditions, or privileges of employment" was not intended to reach the actual working conditions of employees but rather was intended to be confined to the obligation to provide an equal opportunity for employment apart from the physical condition thereof. 585 F. 2d at 194 n. 3.

Pursuing its logic, Talman has insinuated that a gender-based dress code has only a minor effect on a women's employment,

and that judicial intrusion into an employer's decisions in this area is bad public policy. Petition for Certiorari at 25-27, citing *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567 (1978). In *Furnco*, however, the lower court found that no discrimination existed, and therefore prescribed a remedy when there had been no wrong. Here, the Seventh Circuit expressly found discrimination. Further, as stated in *Sprogis* v. *United Airlines, Inc.*, 444 F. 2d 1194, 1198 (7th Cir.), *cert. denied* 404 U. S. 991 (1971):

> The scope of § 703(a)(1) is not confined to explicit discrimination based "solely" on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike *at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes*. Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities *and enjoyment* which have plagued women in the past. (Emphasis added, footnote omitted).

This specific passage was quoted with approval by Mr. Justice Stevens in *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U. S. 702, 707, n. 13 (1978) in connection with the Court's finding that it is

> now well recognized that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males or females. 435 U. S. at 707.

C. No Business Necessity or Bona Fide Occupational Qualification Justifies Talman's Uniform Policy.

Talman has argued that its uniforms are an important competitive measure and contribute to customer relations. Apparently, Talman believes that these reasons justify its uniform policy even if this policy discriminates against women. However, as noted by the Seventh Circuit, the test in Title VII is not merely whether a rule or regulation is "job related" or "reasonably necessary." In order to overcome a *prima facie* case of discrimination, an employer must show either a busi-

ness necessity or that the discriminatory requirement is a *bona fide* occupational requirement. *Chastang* v. *Flynn & Emrich Co.*, 541 F. 2d 1040 1042-43 (4th Cir. 1976); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 798 (4th Cir.), *cert. dismissed* 404 U. S. 1006 (1971); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973).

Section 703(e) of the Act, 42 U. S. C. § 2000e-2(e), permits sex discrimination in those certain instances where "sex . . . is a *bona fide* occupational requirement reasonably necessary to the normal operation of that particular business or enterprise." In the recent case of *Dothard* v. *Rawlinson*, 433 U. S. 321 (1977), this Court stated that it was "persuaded—by the restrictive language of § 703(e), the relevant legislative history and the consistent interpretation of the Equal Employment Opportunity Commission—that the bfoq exception was meant to be an *extremely narrow* exception to the general prohibition of discrimination on the basis of sex." 433 U. S. at 334 (emphasis added, footnotes omitted).

Stated another way, the § 703(e) exception applies only if the employer can prove:

> that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to safely and efficiently perform the duties of the job involved. *Id.* at 333 (citation omitted).

Since women are routinely hired at Talman as tellers and office and managerial employees, the same as men, the *bona fide* occupational qualification exception is not applicable. *Chastang* v. *Flynn & Emrich Co.*, 541 F. 2d 1040, 1043 (4th Cir. 1976).

Nor can Talman's uniform policy be justified as a business necessity. A business necessity connotes an "irresistible demand" and must "not only directly foster safety and efficiency of a [business], but also be essential to those goals." *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 662 (2d Cir. 1971); *Waters* v. *Wisconsin Steel Works, International Harvester Co.*,

502 F. 2d 1309, 1321 (7th Cir. 1974), *cert. denied* 425 U. S. 997 (1976). "[B]usiness necessity only justifie[s] a discriminatory business practice where no acceptable alternative policies or practices would accomplish the business purpose advanced with less discriminatory impact." *EEOC* v. *New York Times Broadcasting Service, Inc.*, 542 F. 2d 356, 361 (6th Cir. 1976). As noted by the Seventh Circuit, Talman has several permissible alternatives to the present discriminatory dress code, including requiring women as well as men to wear "appropriate business attire," making the uniform optional for its women employees, or requiring all employees to wear the uniform. Petition for Certiorari at A8. Carroll has never argued that Title VII requires that the uniforms be abolished; rather, Carroll seeks equal treatment for similarly situated employees of both sexes.

III.

NO CONFLICT EXISTS AMONG THE CIRCUITS.

Talman has suggested that the decision of the Seventh Circuit conflicts with the decisions of seven other circuits on the same issue. This statement is erroneous. Virtually all the cases cited by Talman involved the question of whether an employer can require its men employees to have short hair or to be clean-shaven. These so-called "long hair" cases divide employees into two groups; for example, women plus clean-shaven men in one group, bearded men in another. Thus, in light of *Manhart*, the "long hair" cases do not meet the threshold criteria for determination of the existence of sex discrimination, since a "long hair" policy does not create an absolute male-female dichotomy.

The "long hair" cases are both factually and legally distinguishable from the instant case. These cases simply hold that an employer can require his or her employees to present a businesslike appearance to customers by adherence to personal appearance regulations reflecting customary modes of grooming (such as short hair on male employees), which modes in fact

differ between men and women. There is a vast difference between a dress code requiring all employees to appear business-like and a dual system requiring women to wear a uniform while permitting men to choose appropriate business attire. As the Seventh Circuit noted, the courts' of appeals opinions approving "long hair" regulations

> find some justification in commonly accepted social norms. . . . However, the situation is different where, as here, two sets of employees performing the same functions are subjected on the basis of sex to two entirely separate dress codes—one including a variety of normal business attire and the other requiring a clearly identifiable uniform. Petition for Certiorari at A10.

Talman has not, and cannot, argue that any societal expectation or norm requires women to wear a uniform to fulfill an employer's requirement of appropriate business attire. Indeed, quite the opposite is true; as the Seventh Circuit found,

> [T]he disparate treatement is demeaning to women. While there is nothing offensive about uniforms *per se*, when some employees are uniformed and others are not, there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes. Petition for Certiorari at A10.

In contrast to the negative ramification of Talman's uniform policy for women, a societal norm of dress or grooming such as a necktie or short hair is not demeaning to men. Furthermore, all the "long hair" cases cited by Talman as conflicting were decided before *Manhart*. In addition, since their "long hair" decision, both the D. C. Circuit and the Sixth Circuit have held that differences in treatment of men and women employees that do not affect employment opportunities can nevertheless constitute sex discrimination under Section 703(a). *See Harrington* v. *Vandalia-Butler Bd. of Education,* and *Laffey* v. *Northwest Airlines, Inc.*, discussed at 13-14, *supra.*

IV.

ANALOGIES TO THE OTHER FORMS OF DISCRIMINATION COVERED BY TITLE VII SHOW THAT TALMAN'S DRESS CODE DISCRIMINATES ON THE BASIS OF SEX.

The absurdity of Talman's argument that its dress code does not discriminate is highlighted by a simply analogy. Imagine Talman differentiating between its employees' dress on the basis of race, color, religion, or national origin (all *in pari materia* under Section 703(a)(1)). For example, could blacks, but not whites, be forced to wear a uniform in order to "assure" that they would be appropriately dressed?

The courts have held that all cases and statutes which set forth the policy of the law with regard to racial discrimination are applicable in sex discrimination cases. *Barnes* v. *Costle,* 561 F. 2d 983, 986-88 (D. C. Cir. 1977); *Palmer* v. *Central Mills, Inc.*, 513 F. 2d 1040, 1042-43 (6th Cir. 1975), *cf. Los Angeles Dep't of Water & Power* v. *Manhart, supra, Dothard* v. *Rawlinson,* 433 U. S. 321, 329 (1977); *Yuhas* v. *Libby-Owens-Ford Co.*, 562 F. 2d 498 (7th Cir. 1977), *cert. denied* 435 U. S. 934 (1978).

There is certainly no legislative history which suggests that sex discrimination is to be given any less protection than race discrimination. Indeed, House Report No. 92-238, 1972 U. S. CODE, CONG., AND ADMIN. NEWS at 2141, which discussed the need for the 1972 amendments to Title VII, states:

> This Committee believes that women's rights are not judicial divertisements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.

CONCLUSION.

In an enviroment in which most top management are men, Talman requires all its women to wear a uniform. As the Seventh Circuit noted, this policy is based upon the stereotyped, and factually unfounded, notion that women do not know what to wear to work. For the reasons stated above, Talman's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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